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Wal-Mart Stores, Inc. and Steven Lockyer. Cases 11–CA–18629 and 11–CA–18636

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On April 21, 2003, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

Dated, Washington, D.C. September 30, 2003

Robert J. Battista,	Chairman
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Wilma B. Liebman,	Member
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Dennis P. Walsh,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

Donald R. Gattalaro, Esq., for the General Counsel.

Richard L. Rainey, Esq., for the Respondent.

¹ In adopting the judge's finding that the Respondent did not promulgate, maintain, and enforce an overly broad no-solicitation and no-distribution rule or disparately remove union literature from company bulletin boards in break rooms in violation of Sec. 8(a)(1) of the Act, we note that the Respondent uniformly prohibited the posting of non-work-related messages on its bulletin boards.

The Respondent has not excepted to the judge's finding that anti-union animus was a motivating factor in the Respondent's decision to discharge Charging Party Lockyer. However, we agree with the judge's further finding that the Respondent has met its burden of establishing a defense under *Wright Line*, 252 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. The original charge in Case 11–A–8629 was filed on March 27, 2000,¹ by Steven Brian Lockyer (Lockyer). The original charge in Case 11–A–8636 was filed by Lockyer on March 31, 2000, and amended on May 19, 2000. Based upon the allegations contained in Cases 11–A–18629 and 11–A–8636, the Regional Director for Region 11 of the National Labor Relations Board (the Board) issued an order consolidating cases, complaint, and notice of hearing on October 29, 2002. The complaint alleges that Wal-Mart Stores, Inc. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by promulgating, maintaining, and enforcing an overly-broad no solicitation and no distribution rule and by disparately removing union literature from bulletin boards and break rooms. The complaint also alleges that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Lockyer on March 24, 2000. Respondent filed a timely answer on November 6, 2000, denying the violations as alleged.

A hearing on these matters was conducted before me in Boone, North Carolina, on February 20 and 21, at which all parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. General Counsel and Respondent filed briefs, which I have duly considered. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is engaged in the operation of a chain of retail department stores throughout the United States, including its store in Boone, North Carolina. Annually Respondent purchased and received at its Boone, North Carolina store, goods and materials valued in excess of \$50,000 directly from points outside the State of North Carolina. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits, and I also find that the United Food and Commercial Workers International Union (Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent opened its store in Boone, North Carolina in December 1996. At the time of Lockyer's discharge in 2000, Respondent maintained both a smoking and a nonsmoking break room for its employees. Respondent asserts that it maintained several bulletin boards throughout the facility for company use only. There were two bulletin boards in one break room and one bulletin board located in the other break room. There was also a small corkboard located immediately outside

¹ All dates are 2000 unless otherwise indicated.

the nonsmoking break room. Additionally, there were three large bulletin boards containing posted employee schedules located outside the personnel office.

Steven Lockyer began working at Respondent's Boone store in May 1999 and initially worked in the lawn and garden department. When he sustained an on-the-job injury in May 1999, he transferred into the maintenance department. As a college student, Lockyer worked part-time, averaging approximately 20 hours a week on Fridays, Saturdays, and Sundays. As an employee in maintenance, Lockyer had no specific immediate supervisor. He testified that he "answered to everybody, all the assistant managers and management." When Lockyer was asked who he would contact in management to worked that out among themselves. Lockyer later testified that if he needed to take off several days in succession, he would go through Personnel Manager Michelle (Byrd) Miller² (herein referred to as Byrd) who prepared the work schedules. Lockyer testified that he did not take regularly scheduled breaks or lunch periods. He asserted that he and the other two employees in maintenance routinely took as long as they desired for breaks and lunch and merely clocked in and out to record their actual worktime.

General Counsel's Evidence

Counsel for the General Counsel presented Steven Lockyer as his only witness. The following statement of the facts is Lockyer's description of events occurring in March 2000.

1. Lockyer's distribution of notices to employees

Lockyer visited the Board's website and found information concerning employees' rights to seek union representation. After viewing the Board's official website, Lockyer prepared a poster for his fellow employees. On March 4, he posted the notice on the bulletin boards in both break rooms as well the bulletin board outside the nonsmoking break room. He also left multiple copies of the notice on the tables in both break rooms. In the notice, Lockyer asked employees if they were tired of working at a store that was purposely understaffed with one standard for management and another standard for employees. He advocated that if employees wanted better pay, better representation, and better benefits, they should do the following:

Do what other Wal-Mart stores are beginning to do. Vote for union representation. Some Wal-Mart Associates in different stores have voted and are represented by the union. Wal-Mart meat cutters at the superstores are. Some Wal-Mart Associates in Canada are. **FEDERAL LAW PROHIBITS EMPLOYERS FROM INTERFERING WITH OR PUNISHING EMPLOYEES THAT TRY TO UNIONIZE THEIR WORKPLACE.** The National Labor Relations Board will conduct a secret vote of only Associates. **NO MANAGEMENT WILL BE ALLOWED TO ATTEND.** We can start our own union. **IT IS AGAINST FEDERAL LAW SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT TO REMOVE THIS POSTING.**

While no management representative was present when he posted and distributed the posters, Lockyer later discovered that

the posters had been removed. Another employee told him that a man that she believed to be the new store manager had removed the postings. Although Lockyer went to Personnel and attempted to find the individual who removed the postings, he was unsuccessful. He again posted the notices on the bulletin board and left copies of the notice on the break room tables. As he finished putting up the notices in the smoking break room, Assistant Manager Johnny Pearson walked in and removed all the postings. As Lockyer walked out of the break room, he saw Assistant Manager Randy Osborne leaving the nonsmoking break room, holding the notices that Lockyer had just reposted. Lockyer confronted the managers and asked why they were removing the notices when he was allowed to post them. Osborne told him that he was not allowed to post things of this nature at Wal-Mart. When Pearson began to move toward the bulletin board outside the break room, Lockyer told him not to worry about it and he removed the notice that he had just previously posted.

When Lockyer arrived at work on March 5, he proceeded to the break rooms where he encountered Assistant Managers Pearson, Osborn, as well as Support Manager Rick Geisler. Despite their presence in the break rooms, Lockyer again posted a notice in both break rooms and on the bulletin board outside the nonsmoking break room. He again left multiple copies of the notice on the tables in both break rooms. He then left the break rooms and went to the restroom. Upon his return to the break room area approximately four to five minutes later, all of the posted notices were gone. In the notice posted on March 5, Lockyer asked employees if they wanted more say in their workplace, better pay and conditions, and a better schedule and if they were tired of the understaffing. He suggested that they could do the following:

We can form our own "WORKERS FOR WORKERS" Association. We can make a difference here at Wal-Mart. If we form this association, management must listen to the needs we address. **DO NOT BE INTIMIDATED.** Management by law is not allowed to interfere in ANY WAY with our right to form this association. This can be your way to address any work related problems you have. **DISCUSS THIS AMONG YOURSELVES ON YOUR BREAKS AND DECIDE IF YOU WANT BETTER CONDITIONS AT WORK.** This association can raise your concerns with management about the long hours that you spend standing at the register, your lack of time off, pay problems, the large difference in pay and benefits between management and associates. You can address all these problems and more.

A lawful, management exempt, secret ballot can be held here at Wal-Mart. This ballot would be conducted by the NATIONAL LABOR RELATIONS BOARD at no charge to us. If 50% of the voting Wal-Mart associates want self-determination in the workplace, Management by law would have to recognize our association. Feel free to contact me about any questions or concerns you have.

Steve Lockyer
297-2062

² In March 2000, Miller's surname was Byrd, her maiden name.

As Lockyer was walking toward the break room area on March 7, he saw Store Manager Anthony Trent and Assistant Manager Pearson standing in the break room area. Lockyer posted his second notice in both break rooms and then sat down in the smoking break room. Trent entered the break room carrying the notices that Lockyer had just posted in the nonsmoking break room and on the outside bulletin board. Lockyer described Trent as appearing upset with a red face and pulsing forehead. Holding the notices, Trent asked Lockyer "why are you doing this?" Lockyer told him that he had some issues that he wanted to address. Trent explained that he was not allowed to post the notices on Wal-Mart property and that he had to stop. Trent inquired when Lockyer was scheduled to return to work and Lockyer told him that he would be back to work the weekend after spring break. Trent told Lockyer that he would see him at that time. Lockyer then observed Pearson removing all of the remaining posted notices.

On March 9, Lockyer again posted copies of his second notice in both break rooms as well as the outside bulletin board and left the copies on the break room tables. He observed Osborne, Geisler, and Pearson "milling around" the break room area. As he left the break rooms, one of the managers told him that Trent wanted to see him. He encountered Trent on his way to personnel. When Trent asked Lockyer why he posted the notices, Lockyer explained that he had an issue with Wal-Mart about his worker's compensation. He went on to state that this issue had brought about his talking with other employees and he had discovered a "lot of grievances" and problems that the employees could not address with management. Trent explained that he didn't feel that Respondent needed a union or a third party coming between management and the employees. He added that Respondent could handle it by itself. Trent further explained that he had been advised that Lockyer could leave the postings on the tables but anything posted on the bulletin boards or anything attached to Wal-Mart property would be removed.

On March 11, Lockyer distributed copies of his notices on the break room tables prior to clocking in. After clocking in and checking the bathrooms for cleaning, he went back to the break rooms to discover that his notices had been removed.

2. Lockyer's description of bulletin board materials

Lockyer testified that the bulletin board outside the break room contained notices of items for sale by employees, an obituary concerning a former employee, and thank you notes and sympathy cards from other associates and customers. The bulletin boards in the break rooms contained minutes from Wal-Mart meetings; posters concerning Wal-Mart's missing child program, and information on Respondent's program to reimburse employees for obtaining their GED. He also recalled that from time to time thank you and sympathy cards from employees and customers were posted on the bulletin boards in the break rooms. When asked how long these postings remained on the bulletin boards, he estimated "a couple of weeks." Lockyer acknowledged during cross-examination that the only nonwork related items that he could recall having seen on the break room bulletin boards had been the occasional thank you notes from customers and employees. He also admitted that he told the

Board during its investigation that he had understood that the bulletin board outside the break room was for employees and the bulletin boards inside the break rooms were more work related.

3. Lockyer's failure to clock out

Lockyer testified that he left the store during his lunchbreak on March 11. He recalled that he went home to eat lunch and that he also picked up some medication while away from the store. He acknowledged that he would have been away from the store for at least 30 minutes and did not deny that it could have been longer than an hour and a half. Admittedly, he had no recollection of the actual length of time that he was away for lunch. He testified that after he clocked in from lunch on March 11, he had the feeling that he may have failed to clock out when he left for lunch. Lockyer explained that the time recording system is set up to allow an employee to press a button to check the last time that his or her card has been swiped or registered in the system. Because he had already clocked in, Lockyer determined that if he pressed the button, the system would only show him the swipe that he had just made to clock in from lunch. Lockyer testified that he knew of no other way to find out when or if he had punched out for lunch. At that point in time, he saw Support Manager Geisler. He told Geisler that he thought that he might have forgotten to punch out for lunch. At the same time that Lockyer asked Geisler to check for him, Geisler told him that Osborne had been looking for him for 2-1/2 hours.

Lockyer recalled that Osborne approached them at that point and informed Lockyer that he needed to go to the personnel office. Once inside personnel, Osborne told Lockyer that he had been advised that Lockyer was not allowed to put the postings on Wal-Mart property and that he had to stop. Lockyer argued that he had a right to do so and he told Osborne that he was not going to stop. Osborne explained that if Lockyer continued to do so, Osborne would remove it because it could not be posted on Wal-Mart property. Lockyer recalled that at the end of the conversation with Geisler and Osborne, he again asked Geisler to check if he had clocked out earlier for lunch. Geisler stated that he would. Lockyer tape-recorded the conversation with Osborne and with Geisler. General Counsel submitted into evidence a copy of the audiotape and a transcript of the tape-recorded conversation that had been prepared by Lockyer. The tape recording and the transcript contained no discussion with Osborne of Lockyer's absence from the store. Respondent was given the opportunity to prepare and to submit its own transcript of the tape-recorded conversation.³

4. Lockyer's termination

Lockyer testified that Geisler never got back with him to clarify whether he failed to clock out for lunch. Lockyer did not work the following day or the next weekend. When he returned on March 24, he went to the break room and placed additional notices on the tables in the break room. The notice

³ Respondent's transcript version, submitted as an attachment to counsel's brief contains essentially the same transcription as Lockyer's. Respondent's version of the transcript however, shows more of the conversation as unintelligible.

contained four sections of print that were encircled. Each circle contained the identical wording, urging Wal-Mart associates to vote for employee representation and collective bargaining. After clocking in, Lockyer was called to Personnel to meet with Trent. Personnel Manager Michelle Byrd and Loss Prevent District Manager Scott Marvin were also present in the room. Trent informed Lockyer that he was terminated for leaving the store on March 11 while on the clock. Lockyer told Trent that while he had suspected that he might have forgotten to clock out for lunch on March 11, he brought it to Geisler's attention and had asked him to check on it for him. Trent responded by saying that Osborne had been the supervisor who had discovered Lockyer's absence while on the clock. Trent told Lockyer that when Osborne had confronted him, Lockyer had denied failing to clock out.

C. Respondent's Evidence

Respondent presented its case through the testimony of seven management witnesses in addition to Lockyer. The following account of the facts is based upon the testimony of Respondent's witnesses.

The schedule for employees is completed 3 weeks in advance of the employee's scheduled worktime. When employees report to work each day, they are required to swipe their employee badge at the timeclock. Employees are also required to swipe their badges when they leave and return from lunch and when they leave work for the day. If an employee forgets to clock out for lunch, the employee is required to complete a time adjustment sheet that is maintained at the timeclock. Employees may also use the timeclock to check the last punch on the timeclock as well as to check the total hours worked that day or for that particular week.

1. Lockyer's absence on March 11

Lockyer was scheduled to work from 2 p.m. to 10 p.m. on March 11.⁴ Osborne recalled that there were six, seven, or more maintenance calls on the floor requiring Lockyer's attention throughout the afternoon of March 11. Although Lockyer was paged through the public address system to respond to the calls, Lockyer did not answer the page. Osborne first began looking for Lockyer around 3 p.m. Osborn recalled that Support Manager Geisler, Assistant Manager Rick Rentz, and he went through the store on several occasions looking for Lockyer, however they were unable to find him. Unable to find Lockyer, Osborne checked the computer and determined that Lockyer had not punched out. When Osborne later learned that Lockyer had returned to the store, he directed Geisler to bring Lockyer to personnel. During the meeting, which occurred around 5:45 p.m., Osborne asked Lockyer if he had punched out and Lockyer asserted that he had done so and suggested that Osborne check. Osborne recalled that when he had told Lockyer that he had already done so, Lockyer did not respond. Osborne testified that at the time that Lockyer claimed that he had not punched out, Osborne had already viewed the time record and had seen that Lockyer had not punched in or out for lunch. Osborne testified that he had not heard Lockyer ask

Geisler to check to determine if he had clocked out for lunch. Geisler testified that he did not recall Lockyer's asking him to check his timeclock punches.

Geisler testified that when Lockyer entered the personnel office, Osborne initially mentioned that he had an issue to discuss with Lockyer. Anticipating that the issue involved the union literature, Lockyer brought up the matter of his postings. Geisler's notes of the meeting on March 11 indicated that when he had seen Lockyer to tell him that Osborne wanted him in the personnel office, Lockyer was again posting the union literature on the break room bulletin boards. Geisler's notes included no further reference to Osborne talking with Lockyer about his being away from the facility. The notes include only the discussion between Osborn and Lockyer about his posting the union notices.

Osborne recalled that sometime between 3 and 5 p.m. on the afternoon of March 11, he first learned that Lockyer had been posting notices about the union on the Company's bulletin boards. Initially, Osborne could not recall whether he had heard about the posted notices before or after he had checked the timeclock to determine if Lockyer had clocked out. He later clarified that he did not learn of the union notices until after he had looked for Lockyer and checked the computer. Through Respondent's manager's toolbox publication, managers are instructed as to what action to take if they become aware of possible union organizing. Managers are directed to immediately contact the union hotline at the corporate headquarters in Bentonville, Arkansas. Upon learning of Lockyer's posting of the notices, Osborne immediately contacted Bentonville and reported the content of the notices. The Bentonville resource told Osborn that while the literature was not allowed on the company bulletin boards and doing so was a violation of the no solicitation policy, Lockyer could talk with employees and distribute his literature in a nonworking environment.

Osborne also recalled that during his meeting with Lockyer on March 11, he told him that it was not permissible to post any literature on the company bulletin boards. When Osborne asked Lockyer about posting the notices, Lockyer told him that he was within his rights to do so.⁵ Lockyer told Osborne that if he took down the notices, he would just put them back up again. Osborne recalled that the meeting ended on a cordial note and no discipline was given to Lockyer for posting the notices on the company bulletin board. Osborne did not recall speaking with Trent about his meeting with Lockyer. He denied that either Trent or Respondent's District Manager had ever asked him anything about the events of March 11. Osborne also denied that he ever removed any of Lockyer's notices from the bulletin boards or from the break room tables.

Osborne testified that as a maintenance employee, Lockyer was not allowed to come and go as he pleased. An employee is expected to work the full shift as scheduled. If there is an emergency requiring the employee to leave, the employee is expected to notify management concerning the need to leave. Trent testified that maintenance employees are not free to come and go from the store without permission. If the employees

⁴ Respondent submitted the archived computerized schedule showing Lockyer's scheduled work shift for March 11, 2000.

⁵ Geisler recalled that Lockyer was the first to raise the issue of the union notices.

were caught up on a particular evening and business was slow, he would allow them to leave before their scheduled shift ended. They could not do so however, without getting his or another manager's permission. Although Lockyer did not obtain permission to leave early from any member of management, he clocked out for the day a few minutes after 6 p.m. on March 11. Lockyer testified that he did not recall when he left the store at the end of his shift on March 11 and he could not recall notifying a manager before he left.

Anthony Trent testified that having been on vacation in Myrtle Beach, South Carolina, and away from the store during the week prior to March 11, he did not return to the store until March 13. Trent denied that he had been involved in any conversations with Lockyer on either March 7 or March 9.

Regional Personnel Manager Mike McDowell testified that Trent called him on approximately March 16 to discuss Lockyer's timeclock violation. McDowell instructed Trent to talk with all involved management and get statements to clarify any issues. He did not instruct Trent to talk with Lockyer.

Although Lockyer's timeclock violation occurred on March 11, he was not terminated until March 24; his next scheduled workday. During the termination interview, Trent asked Lockyer if he recalled leaving the store on March 11. Lockyer replied that he did not. When Trent asked Lockyer if he recalled being away from the store for two hours, Lockyer replied that he did not believe that he had been gone for more than an hour. Trent asked Lockyer if he realized that he had not punched out for that time. Lockyer asserted that he had asked Geisler to check to see if he had punched out. Trent testified that he had not investigated Lockyer's claim of having talked with Geisler because the company handbook specifies that it is the employee's responsibility to manage his time. If Lockyer had wanted to correct the problem, he could have completed a time adjustment sheet for the time that he was out of the store and had a member of management to sign and verify its accuracy. The correction would have then been made in the system. Trent acknowledged that he never asked Lockyer for his version of what occurred on March 11 prior to his termination on March 24.

When Lockyer was told that he was terminated for a timeclock violation, he asked if there was an appeals process. In response, Trent called in Mike McDowell, Respondent's Regional Personal Manager. McDowell explained that Respondent had terminated employees for this same infraction in the past and that Respondent had to be consistent when handling these kinds of situations. McDowell recalled that Lockyer told him that he had previously asked Geisler to check his time because he was not sure whether or not he had punched out. McDowell asked him if he had known how to use the timeclock to check his time and Lockyer confirmed that he did. McDowell told him that it was his responsibility to check his own time. McDowell did not check with either Osborne or Geisler to confirm Lockyer's alleged inquiry to Geisler. McDowell acknowledged that the language of the handbook provides that if an employee forgets to clock in, he is to immediately notify his supervisor in order that corrections may be made. On cross-examination, McDowell was asked and answered the following:

Q: Mr. Lockyer had told you he notified his supervisors, Randy Osborne and Rick Geisler, that he may have failed to punch incorrectly, that he asked them to check for him. Does that not follow the wording on page 25 of the handbook?

A: Yes.

Q: And yet you did not call Randy Osborne or Rick Geisler to ask them if Mr. Lockyer was correct in his assertion did you?

A: No, I did not.

2. Respondent's timeclock Policy

As personnel manager, Michelle Byrd conducts orientation for new employees. She explains to employees the various uses of the time adjustment sheets. She testified that she tells employees that the time adjustment sheets may be used when an employee forgets his or her badge or if the badge is malfunctioning. Employees are also told that when they miss a time punch on the timeclock, they are to fill out the time adjustment sheet for the time that they missed and get the signature of a member of management. The sheets are placed in a box on the personnel door and the changes are keyed into the payroll system. Respondent submitted Lockyer's new hire and orientation checklist. The form, dated May 5, 1999, contains the signature of Lockyer and Byrd affirming that all checklist items were covered with the Lockyer. The list includes a tour of the store including the timeclock and an explanation of its use and error correction. Page 25 of the employee handbook states the following with respect to an employee's management of their time:

MANAGING YOUR TIME

This is one of your responsibilities. Our expectation is very clear. Always clock in to begin your workday and at other appropriate times; ask your Supervisor for specific details. If you forget to do this, notify your Supervisor immediately so corrections can be made. Your hard work is appreciated, and we want to pay you for this work. Remember that working off the clock is not only against Wal-Mart policy—it's against the law. Always clock in when you are working--Always! There are no exceptions.

Byrd asserted that while the Handbook does not specifically discuss the requirement to complete a time adjustment sheet if an employee has failed to punch in or out, she covers this requirement with employees during their orientation.

3. Respondent's evidence of Lockyer's failure to clock out

Respondent submitted into evidence the timeclock archive report that was generated for March 11. The report reflects that Lockyer clocked in for work at 2:20 p.m. He clocked out again at 2:44 and in again at 2:52 p.m. The report shows that the next time that Lockyer clocked out was 5:53 p.m. and then in again at 5:59 p.m. He clocked out for the end of the day at 6:08 p.m. When an odd number of punches shows up for an employee at the end of a workday, the time is red-flagged in the system, reflecting that the employee may have forgotten a punch for

that time period. Byrd testified that because there was an even number of punches for Lockyer on March 11, Lockyer's time record was not red-flagged. In reviewing Lockyer's archive time report for March 11, Byrd explained that while he was shown to have taken two breaks, there was no time documented for a lunch break.

4. Respondent's no-solicitation/no-distribution policy

Trent testified that the solicitation and distribution of literature policy that was in effect in March 2000 provided:

ASSOCIATES

Working Time:

Associates may not engage in solicitation and/or distribution of literature during working time. This applies to activities on behalf of any cause or organization.

Selling Area:

Solicitation and/or distribution of literature is not permitted at any time in selling areas during the hours the store is open to the public.

Working Areas:

Distribution of literature is not permitted at any time in working areas.

Non-Associates

Solicitation and/or distribution of literature by non-Associates is prohibited at all times in any area of the store.

Non-Compliance

Call your Regional/Zone Personnel Manager or Corporate Associates Relations before taking any action against an Associate or non-Associates violating this policy.

Byrd testified that in March 2000, there were two bulletin boards in the nonsmoking break room designated for posting of work-related Wal-Mart materials such as information on management staff meetings, and applicable Federal laws and company benefits. The bulletin board in the smoking break room contained the same kinds of work-related materials. Three bulletin boards designated for posting employee schedules were located outside the personnel office. The remaining bulletin board was a small corkboard located outside the nonsmoking break room. Byrd recalled that information concerning the workers' compensation coverage and physician had been posted on the small board. Byrd acknowledged that she was sure that there had been non-Wal-Mart information posted on that board, however it was not permitted. She recalled instances when there was information posted about an employee needing a roommate and a car for sale. When she had seen these, she alerted a member of management and was told to remove such items. Miller maintained that an employee could not get permission to post such nonwork-related items on the bulletin board because such posting was not permitted.

Trent testified that in March 2000 employees were not allowed to post personal items on the store's bulletin boards. Trent recalled only one time that he had seen a noncompany item posted on the bulletin boards and this had been a "for sale" sign for a vehicle. Trent had immediately removed the notice upon finding it.

Byrd testified that sometime after March 2000, Respondent created a second bulletin board outside the nonsmoking break

room. This board was designated at the request of employees to use for such things as thank you cards for donations and bereavement.

5. Lockyer's posting of the union notices

Assistant Manager Johnny Pearson testified that he first became aware of Lockyer's posting union literature on the company's bulletin boards sometime in March. Initially, he could not recall the exact date when this occurred. After reviewing a statement dated March 14, 2000, he recalled that the date had been March 14, 2000. After seeing Lockyer posting the notices, he called Trent and asked for his advice. In response, Trent came to the break room area and spoke with Lockyer. Trent told Lockyer that while he could not post anything on the company bulletin boards, he could leave the material on the tables in the break room if he wished to do so. Although Lockyer argued that he could post anything that he wanted, Trent explained that posting on the company bulletin boards was against Wal-Mart policy.

Trent recalled that he first learned of Lockyer's posting the union notices from Osborne after he returned to the store from his vacation on March 13. Regional Personnel Manager Mike McDowell recalled that Trent called him on March 13 and discussed his concerns about Lockyer's posting the union literature. McDowell told Trent that Lockyer could not post the notices on the bulletin boards, however during nonworking time in nonworking areas, he could place the literature on the tables or even visit with other associates. Trent testified that because Osborne had already taken care of the matter, Trent took no further action. On the day after his return however, he learned from Pearson that Lockyer was again in the store and posting union literature. Trent found Lockyer in the smoking break room and explained that based upon the store's policy, Lockyer could put his notices on the tables in the break rooms. He could not however, post them on the company bulletin boards. In response, Lockyer removed the notices that he had posted and he placed them on the tables in the break room. McDowell recalled that Trent called him again on March 15 and told him that Lockyer had returned to the store on his day off and had again posted the literature again. McDowell recalled that Trent called him again the next day and discussed Lockyer's March 11 timeclock violation.

6. Respondent's reasons for terminating Lockyer

Trent testified that Lockyer was terminated because he left company property on March 11 while on the clock and in violation of the handbook. Trent explained that Respondent compared the schedule to the archive timeclock report and determined that there was a significant amount of elapsed time to allow for a lunchbreak and yet there had been only the breaks recorded. Respondent reviewed the surveillance tapes that documented Lockyer's leaving and returning to the store and determined that he had been gone for about 1 hour and 45 minutes. During the hearing, Respondent offered written statements from four employees who documented their having seen Lockyer's either leaving or re-entering the store on March 11, however none of the individuals were called to testify. While the statements were not received into the record, Lockyer nei-

ther disputes that he left the store nor that he may have been absent for as long as 1 hour and 45 minutes.

Respondent maintains that its termination of Lockyer is consistent with its treatment of other employees who have engaged in similar conduct. Tabitha Arnette was terminated in December 1997 for falsifying her time and extended lunches. Robin Smyre was terminated in April 2000 for misrepresenting her time adjustment sheet and claiming hours that she did not work. Trent testified that he was unaware of any employees who had stolen time who were not terminated.

III. ANALYSIS AND CONCLUSIONS

A. Whether Respondent promulgated, maintained, and enforced an overly broad no solicitation and no distribution rule and whether Respondent disparately removed union literature from bulletin boards and break rooms

Respondent's solicitation and distribution of literature policy bears an October 20, 1997 revision date. Neither in complaint allegation nor in argument does General Counsel allege this written policy as violative of the Act. The complaint alleges that since on or about September 27, 1999, Respondent violated Section 8(a)(1) of the Act by promulgating, maintaining, and enforcing an overly broad no-solicitation and no-distribution rule. The complaint further alleges that such violation has occurred through the acts of Randy Osborne on March 4 and March 11 and through Anthony Trent on March 9. Lockyer testified that in conversation with Osborne on March 4, Osborne told him that he was not allowed to "post things of this nature." He alleges that in a conversation with Osborne on March 11, Osborne told him that he was not allowed to post the notices on Wal-mart property. Lockyer further alleges that in a conversation with Trent on March 9, Trent told him that while he could leave the notices on the tables in the break room, he could not post them on the bulletin boards.

While there is no reference to the use of company bulletin boards in Respondent's solicitation and distribution of literature policy, Respondent argues that in March 2000, there was an established policy that prohibited the posting of nonwork related items on the company's bulletin boards. Respondent maintains that it was not until after March 2000 that a bulletin board was established for employees to post nonwork related materials. Respondent provided no documentation to substantiate when or how this policy was communicated to its employees.

Despite Respondent's lack of documentation however, Lockyer acknowledged his understanding that the bulletin boards in the break rooms were designated for work related materials. While he contends that nonwork related materials were left on the bulletin boards for a "couple of weeks," he admitted that nonwork items on the break room bulletin board were only occasional. Although Lockyer testified that the bulletin board outside the break room contained notice of sale items, an obituary concerning a former employee, and thank notes and sympathy cards from other employees and customers, he did not identify the frequency of these nonwork-related items on this bulletin board. He testified that nonwork items remained on the bulletin boards for a "couple of weeks," however he

identified no approximate date for the posting of any specific item or an estimation of the period of time that a specific item remained on the board.

There was no evidence that any supervisor or manager had knowledge of any nonwork related item posted on any bulletin board that was allowed to remain without removal. Trent recalled only one time prior to March 2000 when he had seen a noncompany item posted on one of the bulletin boards. He testified that he immediately removed it. Personnel Manager Byrd recalled that when she had seen postings related to the sale of a vehicle and a solicitation for a roommate, she alerted a member of management and was directed to remove the items. I found both Trent and Byrd's testimony credible in this regard and credit their testimony that when they were aware of nonwork related postings, they took actions to remove the items.

In *Honeywell, Inc.*, 262 NLRB 1402 (1982), enf'd. 722 F.2d 405 (8th Cir. 1983), the Board summarized the applicable and prevailing legal principles for bulletin board posting. The Board stated:

The legal principles applicable to cases involving access to company-maintained bulletin boards are simply stated and well established. In general, "there is no statutory right of employees or a union to sue an employer's bulletin board." However, where an employer permits its employees to utilize its bulletin boards for the posting of notices relating to personal items such as social or religious affairs, sales of personal property, cards, thank you notes, articles, and cartoons, commercial notices and advertisements, or, in general, any nonwork-related matters, it may not "validly discriminate against notices of union meetings which employees also posted". Moreover, in cases such as these, an employer's motivation, no matter how well meant, is irrelevant. [Footnotes omitted] [Id.]

In an early decision, the Board recognized that an employer "may uniformly enforce a rule prohibiting the use of its bulletin boards by employees for all purposes." *Vincent's Steak House*, 216 NLRB 647 (1975). The Board also noted however, that when an employer, by formal rule or otherwise, permits employees to post nonwork-related messages on its bulletin board, the employer has demonstrated that its property and managerial rights are not jeopardized by the employee posting. The Board has thus held that while employees do not have a statutory right to use an employer's bulletin board, such use receives the protection of the Act when the employer permits them to use bulletin boards for posting personal notices. In these circumstances, an employer may not remove union notices. *Container Corp. of America*, 244 NLRB 318 fn. 2 (1979); *Doctors Hospital of Staten Island, Inc.*, 325 NLRB 730, 735 (1998). Accordingly, if an employer allows employees space or furnishes space to post items of interest, it may not impose content based restrictions that discriminate between posting of Section 7 matters and other postings. See *Vons Grocery Co.*, 320 NLRB 53, 55 (1995); *Amelio's*, 301 NLRB 182 (1991); and *Central Vermont Hospital*, 288 NLRB 514 (1988).

Based upon the testimony of Lockyer, General Counsel asserts that Respondent has allowed nonwork-related postings and essentially argues that Respondent is estopped from re-

stricting Lockyer's postings. I note however, that the Board has also considered whether an employer has knowingly permitted employees to post personal items. The Board has failed to find a violation when there is no evidence that responsible company officials allowed items to remain posted, after they had knowledge of the specific unauthorized postings. See *Miller*, 311 NLRB 1364, 1365 fn. 2 (1993). In *Timken Co.*, 331 NLRB 744 (2000), the Board affirmed the administrative law judge in his finding that the record did not support a conclusion that the employer had tolerated free use of its bulletin boards for unauthorized personal notices to the extent that its removal of union literature can be found disparate or discriminatory. The judge noted that there are bound to be some limited occasions when unauthorized materials have been posted. The judge found that generalized, vague, imprecise, and the very limited testimony of 4 of the General Counsel's 45 witnesses did not support a finding that the employer tolerated free use of its bulletin boards. In the instant case, General Counsel must rely solely upon the recall of Lockyer. In part, he acknowledges that the break room bulletin boards were limited to work-related materials. Although he asserts that employees had greater access and use of the bulletin board outside the break room, his recall of nonwork-related items is generalized with respect to the time when the materials remained posted and there is no evidence that these occasional postings were allowed to remain after their presence was known to management. Accordingly, I do not find that the record supports a finding that Respondent discriminatorily promulgated, maintained, or enforced an overly broad no solicitation and no distribution rule by the statements of Osborne and Trent on March 4, 9, and 11.

General Counsel further alleges that since September 27, 1999, Respondent, acting through Osborne, Pearson, and Trent violated Section 8(a)(1) of the Act by disparately removing union literature from bulletin boards and break rooms. General Counsel alleges that such specific actions occurred on March 4 and March 7, 2000. Generally, just as the employer may not distinguish between postings of Section 7 materials and other nonwork related postings in its content-based restrictions, the employer cannot remove union literature from general purpose bulletin boards while leaving other items of a personal and/or nonbusiness nature. *Kroger Co.*, 311 NLRB 1187 (1993). *Doctors Hospital of Staten Island, Inc.*, supra at 735. Lockyer testified concerning three occasions when he posted the notices but did not see who removed them. He asserted that he saw Pearson and Osborne removing the notices from the break room boards on his second posting on March 4 and that he saw Pearson remove the notices from all the boards on March 7. Although he did not testify to having seen Trent remove any of the notices, he asserted that he observed a notice in Trent's hand on March 7. Both Pearson and Osborne denied removing any of Lockyer's union notices.

Certainly one of the most limiting factors in determining credibility in this case is the fact that all of the events occurred three years prior to the trial. Based upon their testimony, it is apparent that neither General Counsel's witness nor Respondent's witnesses had any independent recall of dates or specific conversations. Their recitation of events appeared to be based

more upon pre-trial review of their previously prepared statements rather than from any independent recall of the individual events.

Lockyer testified that he posted the notices on company bulletin boards between March 4 and March 11. Respondent's witnesses however, deny knowledge of any posting prior to March 11. Osborne and Geisler testified that they first became aware of Lockyer's postings on March 11, which was the same day that Lockyer allegedly left without clocking out. Pearson testified that he was not aware of the postings until March 14 and Trent denies knowledge of the postings until he returned to work from his vacation on March 13. Trent, in fact, credibly testified that he was not even in town during the week of March 4. I find that the overall testimony supports the conclusion that Lockyer posted the notices March 11 and after rather than the dates that he alleges. Lockyer testified that when he discussed the union notices with Trent on March 7, Trent asked him when he was scheduled to return to work. Lockyer recalls telling him that he would return to work the weekend after spring break. I find this testimony significant because Lockyer also testified that he did not return to work during the week following March 11 because he was on spring break. It is undisputed that March 24 was Lockyer's next scheduled workday after March 11. Accordingly, based on Lockyer's own testimony, his conversation with Trent must have occurred during the week that he was on spring break, which was the week following March 11.

For the reasons discussed above, I do not credit Lockyer's testimony that Pearson, Osborne, and Trent removed the union notices on the dates he alleges. While the evidence does not support that Osborne and Pearson⁶ removed the notices on the dates as alleged, I credit Lockyer's testimony that Osborne and Pearson removed some of his posted notices prior to his discharge. Because I have not found that Respondent disparately limited its use of company bulletin boards, I do not find Respondent's removal of the notices as violative of the Act.

B. Whether Respondent unlawfully terminated Lockyer

General Counsel asserts that Respondent terminated Lockyer on March 24 in violation of Section 8(a)(1) and (3) of the Act and because of his union and concerted activities. Respondent however, asserts that Lockyer was terminated because he stole time and not because he posted Union notices. The analytical framework for determining when a discharge violates Section 8(a)(3) and (1) of the Act has been set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). *Wright Line* is premised on the legal principle that an employer's unlawful motivation must be established as a precondition to finding an 8(a)(3) violation. *American Gardens Management Co.*, 338 NLRB No. 76 slip op. at 2 (2002). Thus, the analysis is appropriate in cases such as this one where there is disputed motivation. See *Aluminum Co. of America*, 338 NLRB No. 3, slip op. at 4 (2002). Based upon the *Wright Line* test, the burden rests with the General Counsel to make a prima facie showing sufficient to support the inference that protected conduct was a "mo-

⁶ Lockyer does not allege that he saw Trent remove a notice from the bulletin board, but recalls only that Trent carried a notice in his hand.

tivating factor” in the Respondent’s decision to terminate Lockyer. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line* at 1089. To establish a prima facie case, General Counsel must show the existence of protected activity, Respondent’s knowledge of that activity, evidence of union animus, and the link or nexus between the protected activity and the adverse employment action.⁷

There is no question that Lockyer engaged in activity that he believed to be protected under the Act. Based upon information that he received from the Board’s website, he prepared the notices in issue. Even when told by supervisors that he could not post the notices on the company bulletin boards, he argued the point and continued to post the notices after they were removed from the boards. As discussed above, I have not found that Respondent promulgated, maintained or enforced an overly broad no solicitation no distribution rule by restricting company bulletin boards for work related items. Despite the fact that I found no independent violation in Respondent’s restrictions of its bulletin boards, neither do I find that Lockyer lost the protection of the Act by posting and distributing the union notices. Inasmuch as Respondent denies that it terminated Lockyer for violating the bulletin board policy, I need not address the issue of whether his violation of such policy removes him from the protection of the Act. There is no dispute that by using the prepared notices, Lockyer boldly and repeatedly solicited his fellow employees to seek union representation. His posting the notices on the company bulletin boards does not diminish his union activity. There is no dispute that prior to his termination, Respondent was well aware of his appeals to his fellow employees. Admittedly, Respondent contacted corporate headquarters to determine how to handle this union activity.

To prove a link between the protected activity and the adverse employment action, General Counsel must rely upon whatever inferences may be drawn from the record evidence. Not only is there no direct evidence that Respondent terminated Lockyer because of his protected activity, there is no evidence that he was in any way disciplined for this activity. Even without direct evidence however, the Board may infer animus from all circumstances. *Electronic Data Systems, Corp.*, 305 NLRB 219, 219 (1991). General Counsel urges that Respondent demonstrated union animus by violating Section 8(a)(1) of the Act as alleged in the complaint. Inasmuch as I have found no independent violations of Section 8(a)(1), I do not find animus based upon Respondent’s conduct upon which General Counsel relies as the basis of these allegations.

General Counsel also submits that Trent’s testimony established that Lockyer’s union activities were a motivating factor in his decision to discharge him. Specifically, General Counsel relies upon Trent’s testimony that he considered a report by an employee named Brian Wells relevant to his decision to discharge Lockyer. General Counsel points out that Wells included in his statement his observation of Lockyer posting “union papers while on the clock”. On cross-examination, Counsel

for the General Counsel asked if Trent had considered this statement when he discharged Lockyer. Trent responded:

Well, he was violating a policy. He was never reprimanded for that, but he was violating a policy that time, yes, sir.

The record reflects that while the initial portion of Wells’ statement refers to Lockyer’s posting of the union notices, the remaining one-half of the statement chronicles Lockyer’s disappearance from the store and Wells involvement in the search for Lockyer on March 11. Wells also includes his participation in checking the computer to verify that Lockyer did not clock out and his role in pulling the surveillance tapes to determine Lockyer’s return to the store. I further note that based upon a sustained objection by the General Counsel, this statement was not admitted into record evidence. Based upon the overall evidence, I view Trent’s testimony more as confirming that because Lockyer violated the bulletin board policy, he could have been disciplined, rather than an admission that Lockyer was disciplined for his violation of that policy. I don’t find Trent’s testimony about this statement as sufficient to establish that Lockyer’s posting of the union notices was a motivating factor in his discharge.

Counsel for the General Counsel argues that Respondent’s failure to investigate the matter further at the time of his discharge evidences Respondent’s motivation. As discussed below, I do not find that Respondent failed to fully investigate Lockyer’s misconduct prior to termination. General Counsel submits that Respondent failed to ask Lockyer about his version of what occurred on March 11. General Counsel argues that McDowell admitted that it would have taken no more than 2 or 3 minutes for him to page Osborne to come to the office during Lockyer’s termination interview and provide additional information to McDowell. General Counsel cites the Board’s decision in *Visador Co.*, 303 NLRB 1039, 1044 (1991), as precedent that respondents who justify their issuance of discipline by relying on incomplete investigations of crucial facts have seized upon a pretext to seemingly justify unlawful actions. General Counsel maintains that in this case, that presumption cannot be rebutted. Certainly the Board has found that an employer’s failure to fully and fairly investigate an employee’s alleged misconduct, or even to provide the employee with an opportunity to rebut the accusation suggests the presence of discriminatory motivation. See *Traction Wholesale Center Co.*, 328 NLRB 1058, 1072 (1999), *Denholme & Mohr, Inc.*, 292 NLRB 61, 67 (1988).

In the instant case however, Respondent asserts that Lockyer’s absence was first addressed with him on March 11. While Lockyer denies that Osborne confronted him with his failure to clock out on March 11, he admitted that he was aware that he may not have clocked out and he alleges that he asked Geisler to check it for him. Lockyer testified that he tape-recorded a number of his conversations with managers prior to his termination. He contends however, that he lost all of his notes and the tapes of all the conversations with the exception of two audiotapes and videotape that he provided to the Board during its investigation. Lockyer contends that he tape-recorded his conversation with Trent on March 9 as well as his conversation with Osborne and Geisler on March 11. Lockyer

⁷ *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

admitted however, that he took the tape-recorded conversations and re-recorded them to another tape. The final copy of the consolidated recordings that he provided to Region 11 for its investigation includes his recorded statement at the beginning of each alleged conversation identifying the date and conversation. At trial he admitted that the recording of March 11 includes a portion of the conversation that is repeated twice. He conceded that the statement was not repeated twice during the actual conversation. Lockyer could not explain this occurrence except through speculation that he may have recorded over the first version of his re-recording. The tape of his alleged March 9 conversation with Trent was entirely unintelligible and even Lockyer was unable to transcribe it. Inasmuch as I credit Trent's testimony that he was not even at the store on March 9, I do not credit Lockyer's testimony that he either had the conversation with Trent on March 9 or that he recorded it as he alleges. He may well have had a conversation with Trent, however, I do not credit Lockyer's testimony that it occurred on March 9. It appears that when Lockyer prepared this tape to submit as evidence in support of his charge, he arbitrarily designated a date for this conversation. Whether he chose this date based upon a faulty recall or whether he may have thought it to be more supportive of his case would be mere speculation. I note that Lockyer's transcript of his March 11 conversation includes primarily conversation concerning his posting of the union notices. There is no reference to Osborne's having confronted him with his failure to clock out. There is the inclusion of Lockyer's gratuitous comment to Geisler that he wanted him to check as to whether he had clocked out. Inasmuch as Lockyer admits that he altered the tapes, I cannot conclude that this tape-recorded conversation is Lockyer's total and complete conversation with Osborne. Lockyer himself admits that he was not only confronted with his absence by Geisler, but that Osborne approached him and directed him to the Personnel Office. Lockyer does not deny that the first thing that Geisler told him upon seeing him after his return to the store was that Osborne had been looking for him for 2 hours. It is implausible that upon seeing him, Osborne said nothing to him about his absence. While Lockyer may not have recorded or saved the recording of this conversation with Osborne, Lockyer's testimony cannot be credited. I find Osborne to be a more credible witness and credit his testimony that he confronted Lockyer with his failure to clock out on March 11. Accordingly, based upon the credited testimony of Osborne, Respondent initiated its investigation of the matter on March 11 and did not need additional investigation on March 24.

In his brief, Counsel for the General Counsel states that Osborne claimed that he did not discuss the events of March 11 with either Trent or McDowell. General Counsel asserts that Osborne's testimony is completely contradicted by Trent, who testified that he made the decision to discharge Lockyer based primarily on his conversation with Osborne regarding the events of March 11. General Counsel further asserts that only the most gullible of persons could, or would, believe that Osborne truthfully testified when asserting that he did not discuss the events of March 11 with Trent. A review of Osborne's testimony however, reflects that it was not as explicit as argued.

On cross-examination, Osborne was asked and he answered accordingly:

Q: ow, after this March 11th conversation, did you report it to Mr. Trent?

A: I probably did.

Q: robably did or you did?

A: don't remember talking, sir.

Q: Dd you give your notes to Mr. Trent?

A: think I just turned them in to personnel.

Q: ere they put in some specific file, to your knowledge?

A: don't' remember, sir, to be honest.

Osborne went on to testify that he had left his notes in his own personal filing cabinet as it was over the weekend and he didn't remember how the notes were actually transferred to Personnel. When asked if he had discussed the events of March 11 with any manager, he confirmed other than his notes he had not. He testified that Trent had not asked any questions and he didn't think that McDowell had asked any questions. Osborne's notes from March 11 were admitted into evidence as Respondent's Exhibit No. 6. Osborne's notes reflect that he confronted Lockyer on March 11 with his failure to punch out for lunch. Lockyer responded that he had punched out and that Respondent needed to check the timeclock. When viewed in total, I do not find Osborne's testimony to be in "complete contradiction" to Trent's testimony as argued by General Counsel. As was true of almost every witness, Osborne appeared to have little recall of the events of March 2000 beyond what he included in his notes at that time. He testified that he probably talked with Trent, however, he didn't recall any discussions beyond what he had included in his March 2000 notes. I do not find that Osborne's failure to recall his discussion with Trent three years after the fact to be significant or sufficient to discredit his testimony. I credit Osborne's testimony with respect to his conversation with Lockyer on March 11.

McDowell acknowledges that during Lockyer's termination interview, Lockyer mentioned his request to Geisler to check his time record. It is undisputed that Lockyer videotaped his termination interview with McDowell. The transcript of the interview reflects that Lockyer admitted to McDowell: "Oh, OK I had worked on the 11th on a Saturday. I had left to going on lunch and apparently forgot to clock back in or clock out." Lockyer continued to explain that he had told Geisler that he thought that he had not clocked out for lunch and he had asked Geisler to check on that. Lockyer asserted that Geisler had told him that that he would take care of it. In response, McDowell told Lockyer that he had statements from the assistant managers saying that they asked Lockyer where he was and he had told them that he was on lunch and that he clocked out. The transcript of Lockyer's videotape continues as follows:

Steve: I told them that I thought I clocked out but

District Manager: So they did not check.

Steve: I did not tell them I clocked out ... I told them I think I clocked out but I might not have could you check for me. I said that to Rick and apparently I think he said that to Randy. Randy was going to check.

District Manager: Let me ask you something are you familiar with how the time clock works?

Steve: Oh yea.

District Manager: So you know you can go check that yourself?

Steve: ...pause...yea

District Manager: Check your time check your breaks so your accountable for your time.

Steve: Oh yea I realize that but you know a honest mistake this is um a petty petty um big um getting boot out the door.

District Manager: OK but we also have what you call consistence. And we've had other associates in your store that this has happened to and they were fired.

Steve: Oh really?

District Manager: Got to be consistent.

The interview concluded with Lockyer's request for the termination notice and the surveillance tape to take to employment security. Lockyer also stated that he thought that it was funny that Trent had to show McDowell a tape and get authorization to fire him if other people in the store had been fired for the same thing. McDowell declined to respond and simply explained that he wanted to know what was going on in his stores.

During his interview with McDowell, Lockyer did not deny that he had failed to clock out. He in fact, concedes that he may have failed to clock in or out. Although he asserts that he had asked Geisler to check for him, he admitted to McDowell that he was familiar with the timeclock and that he knew how to check for himself to determine if he had failed to clock out. Based upon Lockyer's own videotape record of the termination interview, he did not deny that he had failed to clock out. Although he contended that he had asked a manager to check his time record for error, he admitted that he knew how to check it for himself. Thus, McDowell's paging Osborne to join the interview would not have produced any information beyond what Lockyer had already provided. Osborne's confirmation of Lockyer's explanation would not have diminished Lockyer's admissions. Accordingly, I don't find that Respondent's failure to conduct any additional investigation prior to terminating Lockyer indicative of Respondent's animus or unlawful motive.

As discussed above, I find no direct evidence that animus motivated Respondent's discharge of Lockyer. I have however, inferred that Respondent acted, at least in part, from antiunion animus. Board precedent allows a finding of animus to rest on indirect evidence in appropriate cases. See *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995). The Board has also found that timing alone may support antiunion animus as a motivating factor in an employer's action. See *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984). Lockyer's discharge within 2 weeks of his union activity cannot be ignored and certainly provides a basis for inferring Respondent's animus in deciding to terminate his employment.

In sum, General Counsel made an initial showing that antiunion animus motivated Respondent's discharge of Lockyer

and satisfies the criteria necessary for establishing a prima facie case under *Wright Line*, supra at 1091. But, when all of the evidence is evaluated, a preponderance of credible evidence supports that Respondent would have terminated Lockyer even if he had not engaged in any union activity. Lockyer does not deny that he failed to clock out when he left the store on March 11. He admits that he has no recall of how long he was away from the facility and he may have been away from the facility for as long as an hour and a half. He asserted during General Counsel's case in chief that when he clocked back in from lunch, he realized that he may have forgotten to clock out upon leaving. When Respondent later produced evidence to show that Lockyer neither clocked out nor in for a lunchbreak, Lockyer provided no rebuttal nor any specific denial that Respondent's records were in error. While Lockyer did not specifically deny the accuracy of Respondent's records, counsel for the General Counsel submits in his brief that the documents "give a mistaken impression that Lockyer could not have punched either in or out on March 11." Counsel for the General Counsel relies upon what is described as a "discrepancy" between two timeclock archive reports for Lockyer for March 11. General Counsel points out that Respondent's timeclock archive report (R. Exh. 5) that was run on March 13, 2000, shows hours worked for employee Shirley S. Jones, an employee listed on the document just preceding Lockyer. The timeclock archive report that was run on March 25, 2000 (R. Exh. 13) does not include Jones' name preceding Lockyer's name, as was reflected on Respondent's Exhibit No. 5. General Counsel submits that because Jones was shown to have worked on March 13 in Respondent's Exhibit No. 5, her name and hours should have been reflected in the time archive report that was later run on March 25. General Counsel argues that both documents should have been identical. General Counsel further submits that this discrepancy is significant because Respondent has demonstrated a propensity to alter documents. In support of this assertion, General Counsel references a portion of a representation hearing transcript in Case 28-RC-5889, which was offered by General Counsel and rejected as a record exhibit at trial. The rejected exhibit contains a transcript excerpt in which a union's counsel and the hearing officer noticed discrepancies in a document offered by Respondent. General Counsel argues that the document had been altered by redacting two headings that were crucial to the issues extant in that hearing. I find this document not only lacking in probative evidence to establish that Respondent altered its timeclock archive report in the instant case but lacking in probative evidence to establish a propensity to alter documents. As General Counsel confirmed at trial, the representation case involved an entirely different law firm and there is no evidence that any of Respondent's Boone, North Carolina store supervisors or managers were involved in this other case. The fact that Respondent has a centralized labor policy emanating from its Bentonville, Arkansas headquarters is not sufficient to establish that Respondent has a propensity for altering documents in all cases involving its 3000 stores or that it has done so in the instant case, especially when Lockyer does not specifically deny the accuracy of the documents. As to the discrepancy, there may be a number of logical reasons why Jones' name does not appear on

the timeclock archive report that was run on March 25. It is possible that Jones employment status changed after March 13 or that other changes in circumstances may have removed her name from the archive report during this 13-day interval. Despite this discrepancy with respect to the inclusion or exclusion of Jones' name and hours, the fact remains that Lockyer's clock punches remain the same for both documents and he does not appear to have clocked in or out for lunch on either document.

There is no dispute that Lockyer's posting of the union notices was of concern to Respondent. Admittedly, he continued to post the notices even after he was told not to do so and he continued to assert that he was legally entitled to do so. There is no dispute that Respondent does not desire union representation for its employees. The employee handbook states:

Wal-Mart is strongly opposed to third party representation. We are not anti-union; we are pro-Associate. We believe in maintaining an environment of open communication between all Associates. At Wal-Mart, we respect the individual rights of our Associates and encourage everyone to express their ideas, suggestions, comments, or concerns. Because we believe in maintaining an environment of open communications through the use of the Open Door, we do not believe there is a need for third party representation. It is our position that every Associate can speak for him/herself without having to pay his/her hard earned money to a union to be listened to and have issues resolved.

There is no dispute that Respondent maintains a union hotline that managers use to report union activity and receive direction as to how to respond. Certainly, Lockyer's union activity was not welcome or appreciated by Respondent. The fact that he was terminated within two weeks of his initiating his union activity lends additional credence to General Counsel's argument that his activity was a motivating factor in the decision to terminate him. Despite the fact that Respondent may have welcomed the opportunity to rid itself of this employee who repeatedly posted and distributed these notices, Respondent has also demonstrated that it would have terminated him in the absence of his union activity. Candidly, Lockyer's conduct simply provided the fortuitous opportunity for Respondent to terminate him in accordance with its policies and past practice. Despite its motivation, I am aware of no legal precedent that would require Respondent to act inconsistent with its past practice or to make an exception for Lockyer because of his demonstrated union activity. Lockyer admitted that leaving company property while on the clock, unless on company business, is prohibited and he does not deny that he left the store without clocking out. He admits that he has no recall as to how long he was away and he admits that he may have been absent for as long as an hour and a half. He admitted on cross-examination that he was instructed in orientation as to how to use the time adjustment sheets and he knew that they were to be used to correct any deficiency in his timecards. He admits that he never completed a time adjustment sheet even though he was aware of a possible discrepancy in his time. Only after he knew that management had been looking for him on March 11 did he mention to Geisler, that he "may" have failed to clock out and he asked Geisler to check on it for him. Admittedly, Lockyer

did nothing further to correct his time. Counsel for the General Counsel relies upon Respondent's handbook that directs an employee who has forgotten to punch in or out to notify his or her supervisor immediately in order that corrections can be made. General Counsel argues that Lockyer's mentioning this possible error was sufficient and counsel appears to view Respondent as then having an obligation to investigate further and to take additional action to assist Lockyer in curing his failure to follow procedures. I don't find that Respondent had this additional responsibility, even when faced with an employee engaging in protected activity. Admittedly, Lockyer knew how to complete a time adjustment sheet and correct his failure to clock in or out. I don't find that his suggestion to a low level supervisor that he may have forgotten to punch out after he was confronted with his absence sufficient to shift the responsibility from Lockyer to Respondent to correct his failure to comply with Respondent's time keeping policies. There is no doubt that Respondent took full advantage of the opportunity to rid itself of this active union supporter. I do not find however, that the evidence supports that it would not have terminated Lockyer in the absence of such activity.

Accordingly, having found no evidence of any independent 8(a)(1) violations and having found that Respondent has demonstrated that it would have terminated Lockyer despite his union activity, I recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Wal-Mart Stores, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The United Food and Commercial Workers International Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated Section 8(a)(1) and (3) of the Act as alleged in the Complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:⁸

ORDER

The complaint is dismissed.

Dated, Washington, D.C. April 21, 2003

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.